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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No.

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DAVID HANDEL, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINION BELOW

The unreported opinion of the Court of Appeals is reproduced as Appendix A to this petition. The District Court did not issue an opinion.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1972 (Appendix B). A timely motion for

rehearing and rehearing *en banc* was denied in orders entered July 28, 1972 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the government's unexplained, five-year delay from arrest to prosecution violated petitioner's Sixth Amendment right to a speedy trial in view of the prejudice suffered by petitioner because of the death of a witness crucial to his defense.

2. An alleged co-conspirator, testifying as a government witness and being questioned by government counsel, was allowed to testify that he had previously been convicted of perjury for denying the conspiracy here in issue. Is this testimony so prejudicial as to have denied petitioner a fair trial in violation of his right of due process.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

This case also involves the Due Process Clause of the Fifth Amendment which provides that no person shall "be deprived of life, liberty or property without due process of law . . ."

## STATUTES AND RULES INVOLVED

This case involves 18 U.S.C. §§ 2, 371, 26 U.S.C. § 7206(2), Rule 52(b) of the Federal Rules of Criminal Procedure, and the Second Circuit's Rules for Prompt Disposition of Criminal Cases (1971) (Appendix D).

## STATEMENT OF THE CASE

Petitioner, David Handel, was tried by jury and found guilty on one count of having conspired to defraud the United States in the ascertainment and collection of revenue information. He was acquitted by the jury on the substantive count of having caused the preparation of a false Information Return, Form 1099.

The charges against petitioner arose from his alleged participation in a twin-double pari-mutuel betting scheme operated by New York's Yonkers and Roosevelt Raceways during the mid-1960's. Some time in 1965, apparently, the government began an investigation of the practice whereby some twin-double winners employed other individuals to cash winning tickets in order to have the winnings reported to the Internal Revenue Service on Form 1099 as the income of the cashers rather than of the real winners. Petitioner at that time earned his living as a successful owner and breeder of horses. This occupation necessitated his daily presence at the raceways, and he was a regular purchaser of twin-double and other pari-mutuel tickets.

In 1965, petitioner was questioned about the twin-double cashing scheme by the United States Attorney's Office in the Eastern District of New York. Although he denied any personal involvement in the cashing scheme, he cooperated in the government's investigation. The government took no further action in connection with petitioner until suddenly, on the evening of May 23, 1966, he was arrested at Yonkers Raceway. The arrest was pursuant to a warrant issued on a complaint by a special agent of the IRS. The agent's complaint stated that he had received information from a

reliable witness that petitioner had paid the witness to cash a ticket for him and to cause Yonkers Raceway to issue a false Form 1099. Despite this claim of probable cause sufficient to warrant the arrest of petitioner, the government did not present the case to a grand jury. Instead, six weeks later, at petitioner's request the government moved to dismiss the complaint.

Then, on December 5, 1968, almost two and one-half years after the arrest, an indictment was returned against petitioner and one Robert Elvin, an alleged co-conspirator. Following the return of the indictment, little happened. On June 2, 1969, defendant moved for a bill of particulars and the motion was granted in part. But the government supplied no particulars.

Then, on February 7, 1971—over two years after issuance of the indictment—the government served notice that it would be ready to proceed to trial sometime after April 1, 1971, upon 20-days notice. Thus, seven years after the events in issue, six years after petitioner had been interrogated, five years after he was arrested (on a warrant based on alleged probable cause), and nearly three years after he was indicted, the government finally announced that it was ready for trial.

Petitioner in no way contributed to this extraordinary delay. He did not request a continuance, nor did he engage in delatory manuvering to achieve that result. On September 21, 1971, petitioner moved to dismiss the indictment by reason of the government's failure to afford him a speedy trial. The government offered no excuse whatsoever for its delay. Nonetheless, the trial court denied the motion saying:

> "... What is virtually insuperable in your case is that the defendant didn't come in himself scream-

ing [for a speedy trial]." Hearing on Motion to Dismiss, October 1, 1971, (Tr. p. 10).

Petitioner's trial began on October 18, 1971. He was tried alone. The alleged co-conspirator, Robert Elvin, had pleaded guilty and was awaiting sentencing at the time of petitioner's trial at which he testified for the government. The government's case was based entirely upon the testimony of five alleged co-conspirators who testified they had cashed tickets for petitioner or had arranged for tickets to be cashed. Each of the alleged co-conspirators had a criminal record or was under indictment at the time of his testimony, and each was seeking special treatment from the government in return for his favorable testimony.

During the course of the government's delay in bringing petitioner to trial, the only witness who could provide testimony to contradict the government's case died. Because of petitioner's occupation as an owner and breeder of race horses, it was his practice to spend practically every evening at the track, most often in the box of a friend and fellow horse-owner, Saul Finkelstein. It was Mr. Finkelstein's testimony which petitioner hoped to introduce as corroboration of his own that he did not employ any of the government's witnesses as cashers. The government's witnesses had testified to having cashed innumerable tickets for petitioner. Mr. Finkelstein would surely have to have seen these individuals with petitioner if their stories were true. But Mr. Finkelstein died before the case finally came to trial.

## REASONS FOR GRANTING THE WRIT

### I

### Petitioner Was Deprived of His Right to a Speedy Trial

Both the Sixth Amendment and Rule 48(b), F. R. Crim. P., guarantee an accused the right to a speedy trial. We believe petitioner was denied that right and that the Court of Appeals' decision rejecting that claim conflicts with this Court's pronouncements in *Barker* v. *Wingo*, — U.S. —, 40 U.S.L.W. 4840 (June 22, 1972), a decision issued subsequent to the Court of Appeals' opinion in the instant case.

In *Barker*, this Court enumerated four factors which must be weighed on an ad hoc basis in determining whether an accused has been denied a speedy trial: (1) the length of the delay, (2) the reason the government assigns to justify the delay, (3) whether defendant asserted his right, and (4) whether defendant suffered prejudice by reason of the delay.

Weighing these factors, petitioner's case presents a classic example of deprivation of the speedy trial guarantee.

#### A. The Length of Delay

Petitioner, through no fault of his own, experienced delay at each turn of events. No matter what period one focuses upon—three years post-indictment or five years post-arrest—the delay was unreasonably long. Indeed, there was a lapse of approximately seven years from the time of the alleged overt acts.

As this Court pointed out in *Barker*, the reasonableness of a period of delay is necessarily dependent upon the peculiar circumstances of each case. This case was not a complex conspiracy charge. Petitioner was indicted for causing winning twin-double tickets to be

cashed by persons other than the true winner so that the revenue information would be reported to the Internal Revenue Service as income to the cashers rather than the actual winners.

As early as May 1966, the government claimed to have knowledge sufficient to arrest petitioner for having paid a witness to cash a ticket for him and to cause Yonkers to issue a false Form 1099. Even with this evidence supposedly in hand, the government delayed over five and one-half years before bringing petitioner to trial. As this Court stated in *Barker*, at 4846:

> "It is clear that the length of delay between arrest and trial—well over five years—was *extraordinary*" (emphasis added).

**B. The Reason for Delay**

At petitioner's hearing on his motion to dismiss for lack of a speedy trial, the government offered absolutely no justification for its inordinant delay in bringing petitioner to trial. In its brief to the Court of Appeals, the government for the first time asserted that the two and one-half year delay between arrest and indictment was consumed by "extensive investigation, review of the case and presentation to a grand jury." Govt. Appl. Br., at 8. The government noted that in a "so-called twin-double case, . . . regular racetrack clientele must be located and interviewed regarding their recollection of specific races in months or years passed." *Id.*

We fail to understand why this investigation should have consumed over two and one-half years, particularly in light of the government's assertion in the arrest complaint of May 1966, that a "reliable wit-

ness' had informed the government that petitioner was engaged in the illegal ticket-cashing scheme.

As for the two-year delay between indictment and trial, the government asserted below that this period was "clearly reasonable." Govt. Appl. Br., at 8. In fact, the government seemed to imply that the two-year delay was excusable because petitioner did not move for a bill of particulars until six months after he had pleaded not guilty. How petitioner's request for a bill six months after his plea, can justify the government's two-year post-indictment delay is incomprehensible.

In light of the government's failure to offer any justification for the delay to the trial court, and its reliance before the Court of Appeals upon generalities of investigatory necessity, it seems likely that the delay was occasioned by the government's intentional desire to wait until it had successfully indicted five individuals who, in return for favorable treatment, would testify that they had cashed tickets for petitioner. Whatever the government's reason, it simply does not excuse the five and one-half year delay from the date of petitioner's arrest to his trial.

### C. Assertion of Defendant's Right

This Court in *Barker* flatly rejected the notion that a defendant waives his right to a speedy trial by failure to assert it. Instead, failure to assert the right is only one factor among four which must be weighed in determining whether an accused has been denied this constitutional guarantee. If, for example, a defendant has for tactical reasons refused to assert the right, he will not later be heard to claim that the right has been denied.

But this is not an instance in which petitioner has refrained from asserting his right for tactical reasons. The defense tactics in this case belie a claim of waiver —intentional or otherwise. Petitioner engaged in no dilatory action or pretrial maneuvering. His only motion, other than the request to dismiss for lack of a speedy trial, was for a bill of particulars which was issued by the government more than two years after requested and only weeks before trial.

Petitioner did not create an atmosphere fostering delay; nor did he deliberately acquiesce in the government's failure to prosecute his case. Petitioner was without counsel for quite some time when his original attorney withdrew from the case because petitioner could not pay his fee. Replacement counsel, shortly after entering the case, moved to dismiss the indictment on grounds of denial of a speedy trial. This motion was made on September 21, 1971, nearly a month prior to the date of trial. It may be true that petitioner was not "screaming" for a speedy trial from the outset, but it is true also that he did nothing to waive his right either.

### D. Prejudice Caused by Delay

Prejudice to a defendant arises both from anxiety and concern over the impending prosecution and from the possibility that delay will impair his defense. Petitioner suffered both. Subsequent to his arrest, the New York State Harness Commission suspended his right to run horses, thereby causing him severe economic hardship. It was only after petitioner's counsel requested the government to dismiss the outstanding complaint that the government did so, pending presentation of the case to the grand jury—which did

not occur for more than two and one-half years thereafter.

But the prejudice petitioner suffered was not limited to the anxiety of social and financial hardship. He was severely handicapped in the presentation of his defense. Not only did he suffer the normal difficulty of attempting to counter the prosecutor's case through recollection of daily events occurring over seven years previously; in this instance, the delay tolled the life of a witness crucial to petitioner's defense.

The death in this case was not that of "just any witness." As a daily patron of the races, petitioner was the constant guest in a box seat owned by Mr. Saul Finkelstein, a prominent owner of horses. Mr. Finkelstein, a close friend and associate of petitioner, knew petitioner's betting practices. He advised and counselled, and was intimately aware of petitioner's actions at the track. Only he could provide crucial testimony to contradict the dimly recollected claims of five government witnesses, each seeking something in return for his participation. The death of this important material witness caused immeasurable prejudice to petitioner's defense.

**E. The Court of Appeals' Analysis Conflicts with this Court's Decision in Barker v. Wingo, U.S. (1972).**

Applying the teachings of this Court in *Barker,* petitioner's conviction should be reversed because of the denial of his right to a speedy trial. But the Court of Appeals did not view the facts of this case in a manner consistent with this Court's subsequent opinion.

First, the Court of Appeals dismissed out-of-hand the two and one-half year delay between the arrest and indictment. The court determined that the speedy trial

provision of the Sixth Amendment did not apply to that period because there had not been an "arrest and holding" (App. 3a). We do not believe an extended delay of two and one-half years between arrest and indictment can be "ignored" simply because the accused was not incarcerated.

Second, with respect to the two and one-half year delay following the indictment, the court pointed out that petitioner had failed to demand a trial and that "absent compelling countervailing considerations," such a failure would be viewed as a waiver of the right to a speedy trial * (App. 4a). This Court pointedly rejected the waiver theory in *Barker*. Because the Court of Appeals required a showing of compelling countervailing considerations to overcome the "waiver," its decision directly conflicts with the dictates of this Court's subsequent decision.

Third, the lower court's only consideration regarding the reason for delay was as follows:

> "Although the government's *unexplained* 28-month delay in preparing for trial might in some circumstances be unreasonable, there is no suggestion here that the delay was *deliberately oppressive.*" App., p. 4a (footnote omitted) (emphasis added).

Contrary to this Court's opinion in *Barker,* the Court of Appeals clearly opined that only "deliberate" or

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* The court's opinion pointed out that the Second Circuit has now adopted new Rules governing pretrial delays and that defendant is not required to assert his right. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971). Even though this petitioner was tried subsequent to adoption of those provisions, he was condemned by the waiver theory because most of his five-year delay occurred prior to the rule's enactment.

"intentional" governmental delay could be deemed oppressive or unreasonable. This Court specifically pointed out that deliberate delay in bringing a defendant to trial would weigh heavily against the government. But even unintentional delay, if unreasonable, can result in the denial of an accused's right. The Court of Appeals clearly erred in this regard.

Fourth, the Court of Appeals characterized the death of petitioner's close associate as the loss of purely "negative" testimony, which would not have "exonerated" petitioner:

> "At best what the witness had failed to see, claimed to be inconsistent with the testimony of five government witnesses, might have affected their credibility. Such a minimal showing of possible prejudice will not suffice to overcome appellant's waiver of his right to a speedy trial." App. 4a.

The court flatly rejected petitioner's claim of prejudice due to the death of a most vital witness simply because that witness' testimony "would clearly not have exonerated [petitioner]." Admitting that the witness' testimony might have affected the credibility of the five government witnesses, the Court of Appeals labeled the death of this witness as a "minimal" showing of possible prejudice not sufficient to overcome petitioner's failure to assert his right to a speedy trial.

This insensitivity to the damning effect the government's delay had perpetrated on petitioner's defense cannot stand in light of this Court's decision in *Barker*. It is appropriate, therefore, that if this petition is not granted for plenary review by this Court, it should be granted for the purpose of vacating the decision below and remanding for reconsideration in light of *Barker*.

## II

### Petitioner Was Irreparably Prejudiced by Testimony Concerning a Co-Conspirator's Conviction of Perjury

Petitioner was denied a fair trial as a result of the government's deliberate introduction of testimony concerning an alleged co-conspirator's prior conviction for perjury for statements to a grand jury pertaining to the exact events in issue at the trial below. The Court of Appeals effectively approved of the government's reprehensible conduct by concluding that petitioner was foreclosed from raising the issue because his inexperienced trial attorney had failed to make the "proper objection." App. 5a.

The nature of the injury to petitioner is best shown by recountation of the situation at trial. Perhaps realizing the weakness of the evidence it could present to the jury against petitioner, the government sought to bolster its case by introducing to *this* jury the opinion of a *prior* jury regarding transactions between petitioner and Robert Elvin. Elvin had been indicted as a co-conspirator but had pleaded guilty and testified for the government. During direct examination of Elvin, the prosecutor asked:

> "Q. Now, other than your plea of guilty to the conspiracy count of this indictment, have you ever been convicted of a crime?
> "A. Yes, sir.
> * * *
> "Q. And you were convicted by a jury after trial?
> "A. Yes, sir.
> "Q. And what were you convicted of?
> "A. Perjury, sir, Perjury in front of the grand jury.
> * * *
> "Q. What was the perjury you were charged with?

MR. BERKOWITZ: I must object, if the Court pleases. That would be set forth in the information.

THE COURT: I will permit him to ask that.

"A. I was asked at the grand jury had I ever cashed or caused tickets to be cashed for Dave Handel. I denied this. For anybody else, I denied this. I denied almost everything having to do with twin double deals.

"Q. And that was the basis of the perjury charge on which you were convicted?

"A. Yes, sir.

"Q. And when you were before the grand jury and when you denied dealing in twin double tickets with Mr. Handel and others, did you lie?

"A. Yes, sir." (Tr. 101-3.)

This answer was not only incredibly prejudicial to petitioner—it was wrong. Elvin's perjury indictment specified four *separate* perjurious answers—only one of which concerned petitioner—and ony *one* of which would have sufficed for Elvin's conviction (Tr. 105). But when Elvin answered as he did, this jury was led to believe that *another* jury had already passed on the truthfulness of Elvin's denial of transactions with petitioner and had found beyond a reasonable doubt that Elvin did in fact cash tickets for petitioner. But this was not the case.

On cross-examination of Elvin, petitioner attempted to counter the prejudice as best he could by pointing out to this jury that four separate answers had been specified in the Elvin perjury indictment. Even this effort was to no avail. On redirect examination, the prosecutor again inquired:

"Q. Do you recall yesterday being asked by Mr. Berkowitz about the specification of perjury on the indictment that you were charged with?

"A. Yes, sir.

"Q. Was one of the specifications in the indictment involving the question of whether you ever received a winning twin double ticket from Mr. Handel?

"A. Yes, sir.

"MR. BERKOWITZ: Objected to, we have been over this.

"THE COURT: I will permit it. Overruled.

"Q. You appealed that conviction?

"A. Yes, sir, I did.

"Q. In the Court of Appeals?

"A. Yes, sir.

"Q. And the conviction was affirmed?

"A. Yes, sir.

"Q. And you petitioned for certiorari to the Supreme Court and that was denied?

"A. Yes, sir." (Tr. 185-86.)

The knife had been inserted and turned the second time.

This testimony was the most severely prejudicial hearsay possible. It not only carried the imprimatur of a criminal verdict, it contained virtually no probative value. The government succeeded in introducing over objection the judgment of a prior jury to prove the truth of the matter asserted therein.

In essence, the government asked Elvin whether another jury, on the same facts before this jury, had found this petitioner guilty. Specifically, the government sought to convince this jury that Elvin had cashed tickets for petitioner by introducing the previous jury's verdict as evidence that the jury had disbelieved Elvin's earlier denials. Obviously, petitioner was not a party to that action and could not be bound by its outcome—even if such outcome were as the gov-

ernment portrayed it. There simply can be no justification for admission of this hearsay testimony.

Perhaps even more important than the fact that the testimony was hearsay is the fact that it was probative of absolutely nothing. Potentially prejudicial evidence may of course be admitted if its probative value clearly outweighs countervailing considerations, but the trial court clearly abused its discretion when it admitted highly prejudicial evidence which possessed absolutely no probative value. In this instance, it was impossible to determine from the single-count indictment, with four perjury specifications, whether the jury's general verdict was the product of its disbelief of Elvin's testimony regarding petitioner or its disbelief of his testimony on any one or all of the other three specifications. The prosecutor was fully aware of that fact. Yet he deliberately pursued this inflammatory line of questioning which could only result in irreparable prejudice to petitioner.

Of course the government was entitled to anticipate an attack on Elvin's credibility by proving his prior conviction—with this we have no quarrel. The government, however, went much further—its effort was not to defuse an attack on Elvin's credibility but outrageously to prejudice petitioner.

In light of the fact that Robert Elvin was the government's key witness in its case, this prejudicial hearsay testimony, used to buttress his own statements, was plain error. Under the government's theory of the case, Elvin played the central role in the conspiratorial scheme. He was the middle-man who allegedly received winning tickets from petitioner and parceled them out among individuals willing to serve as cashers.

It was only Elvin's testimony regarding his alleged conversations with petitioner which gave any basis to the charged conspiracy. And it was Elvin to whom subsequent witnesses pointed as having told them that the winning ticket to be cashed came from petitioner. Consequently, verification of Elvin's testimony was vital to the proof of the prosecution's case—and so admission of the prior jury's verdict to provide that verification was harmful error requiring reversal.

Furthermore, no effort was made by the government or trial court to reduce the harmful impact of the obviously prejudicial testimony. There was no curative instructions given and what effort was made by petitioner to offset the prejudice was immediately and intentionally undone by the government.

Despite the obviously prejudicial effect of telling one jury that another jury had found beyond a reasonable doubt that Robert Elvin had cashed tickets for petitioner, the Court of Appeals concluded that:

> "... review is foreclosed by appellant's failure to make any proper objection below." App. 5a.

Rule 52(b), as well as decisions of this Court, see *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157 (1936), provide that instances of plain error at trial may be reviewed without the necessity of a timely objection.

Here, there in fact was an objection, only it was the wrong one. Petitioner's attorney had not tried a case in many years and at several points requested the trial court's indulgence. When this testimony of Elvin's prior perjury conviction was elicited, he knew by instinct that it was inadmissible. But when he objected, the trial judge asked him to specify the grounds.

Groping, he relied upon the "best evidence" rule. The trial judge replied that if *that* was the objection he would permit the testimony.

The Court of Appeals has looked to this unfortunate scenario to justify not reaching the merits of petitioner's claim that the testimony was unreasonably and intentionally prejudicial, depriving petitioner of a fair trial. The court also pointed to the fact that petitioner subsequently, on cross-examination, brought out the circumstances of the four-count indictment and attempted to use the perjury conviction for impeachment purposes. This makeweight for ignoring the merits of petitioner's claim also ignores the fact that on redirect the prosecutor intentionally refocused the jury's attention on the alleged Elvin-petitioner transaction and emphasized that Elvin even had sought review of the conviction by the Supreme Court.

The testimony as well as the prosecutor's tactics were manifestly unjust and deprived petitioner of a fair trial in accordance with due process of law.

## CONCLUSION

For the foregoing reasons petitioner prays that this Court grant the petition for writ of certiorari and either set the case down for argument or, in the alternative, summarily vacate the judgment below and remand for reconsideration in light of this Court's decision in *Barker* v. *Wingo*.

Respectfully submitted,

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Dated: August 17, 1972

# APPENDIX

## APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 804—SEPTEMBER TERM, 1971

(Argued May 15, 1972 Decided June 13, 1972)

Docket No. 72-1146

UNITED STATES OF AMERICA, *Appellee*,

v.

DAVID HANDEL, *Appellant*.

Before: MOORE, SMITH and HAYS, *Circuit Judges*.

Appeal from conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, for conspiracy to defraud the United States by causing preparation and filing of false information returns, in violation of 18 U.S.C. §§ 371 and 2, 26 U.S.C. § 7206(2). Affirmed.

J. H. TOPKIS, New York, N.Y. (Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y.) *for Appellant*.

PETER L. TRUEBNER, Asst. U.S. Attorney (Whitney North Seymour Jr., U.S. Attorney for the Southern District of New York, Maurice M. McDermott and John W. Nields, Jr., Asst. U.S. Attorneys, of counsel), *for Appellee*.

SMITH, *Circuit Judge*:

David Handel, former horse owner and racetrack bettor, appeals from a judgment of conviction entered on December 14, 1971 after trial to a jury in the United States District Court for the Southern District of New York, Inzer B.

Wyatt, *Judge.* Appellant was found guilty of conspiracy (18 U.S.C. § 371) to defraud the United States in the ascertainment and collection of revenue information by causing the preparation and filing of false United States Information Returns (Form 1099) (26 U.S.C. § 7206(2) and 18 U.S.C. § 2). He was acquitted on the only substantive count which went to the jury, charging that on April 7, 1965 he had caused the preparation and filing of a Form 1099 which fraudulently concealed the name of the true owner of a winning pari-mutuel twin double ticket at Yonkers Raceway.[1] Sentenced to one year imprisonment, appellant is presently enlarged on bail pending the outcome of this appeal. We find no error and affirm his conviction.

The indictment alleged appellant's participation in a scheme operative during 1964 and 1965 at Yonkers and Roosevelt Raceways whereby he would procure after the first two races of the twin double were run potentially winning tickets at a discount, and, working through a middleman, often one Elvin, a co-defendant who pled guilty to the conspiracy count and testified for the government, have the winning tickets cashed by various other individuals "cashers"); the winnings would then be reported to the Internal Revenue Service on the required Form 1099, filed by the racetrack, as income to the cashers rather than to the actual recipients of those winnings. Four of the seven cashers who were named in the conspiracy count also testified for the government.

Appellant's principal reliance is on his contention that his pre-trial motion to dismiss the indictment for violation of his Sixth Amendment right to a speedy trial was wrongfully denied when thirty months had elapsed between his arrest and indictment, and an additional thirty-four months were to pass before the date set for trial.

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[1] The government offered no proof on five other substantive counts, which were dismissed by the court.

The speedy trial provision of the Sixth Amendment applies only after a formal indictment or information has issued, or after the imposition of the "actual restraints" of an "arrest and holding." *United States* v. *Marion*, 404 U.S. 307, 320 (1971). Inasmuch as the government acceded to appellant's request to dismiss the complaint on which he was arrested in 1966 in order to avoid causing him any economic hardship pending presentation of his case to the grand jury,[2] appellant may not rely on pre-indictment delay in asserting his Sixth Amendment claim. Absent a showing of actual prejudice violative of the Due Process Clause of the Fifth Amendment, appellant is dependent on the safeguard of the applicable statute of limitations, not exceeded here,[3] to protect against any possible prejudice from pre-indictment delay.[4]

The basic elements of a sound speedy trial claim based on post-indictment delay set forth in *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88, 90 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) are not present here. We are con-

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[2] The existance of outstanding criminal charges against him had apparently led to appellant's suspension by the New York State Harness Commission. When the government moved to dismiss the complaint, one of the principal threats against which the speedy trial requirement is intended to protect the accused, that of economic hardship, was eliminated. Of the remaining dangers commonly said to be safeguarded by the Sixth Amendment, appellant suffered from one only, anxiety at the knowledge he was the target of a criminal investigation. See *United States* v. *Marion*, 484 U.S. 307 at 320. In *Marion*, where the defendants had been exposed in the newspapers as the object of a purported criminal investigation three years before their indictment, anxiety or concern without a standing formal accusation was not deemed enough to invoke the Sixth Amendment.

[3] 18 U.S.C. § 3282 (5 years).

[4] The reach of Rule 48(b) of the Federal Rules of Criminal Procedure, also relied on by appellant is identically circumscribed. *United States* v. *Marion*, 404 U.S. at 319.

fronted immediately by appellant's failure to demand a trial. Without compelling countervailing considerations, prior to July 5, 1971, when new circuit speedy trial rules became effective, we have consistently viewed such a failure as a waiver of the right to a speedy trial. *See, e.g., United States* v. *Binder*, 453 F.2d 805, 809 and n.5 (2d Cir. 1971); *United States* v. *Smalls*, 436 F.2d 711, 714 (2d Cir.), *cert. denied*, 403 U.S. 463 (1972); *United States* v. *Aberson*, 419 F.2d 820, 821 (2d Cir. 1970); *United States* v. *Maxwell*, 363 F.2d 437, 441 (2d Cir. 1967), *cert. denied sub nom. Aiken* v. *United States*, 389 U.S. 1043 (1968); *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Although the government's unexplained twenty-eight month delay in preparing for trial[5] might in some circumstances be unreasonable, there is no suggestion here that the delay was deliberately oppressive. *See United States* v. *Dooling*, 406 F.2d 192, 196 (2d Cir.), *cert. denied sub nom. Persico* v. *United States*, 395 U.S. 911 (1969). The crucial element of appellant's claim is alleged prejudice resulting from the death of a potential witness during the period of post-indictment delay. We are entirely unpersuaded that there is any demonstrable prejudice here requiring us to overlook appellant's failure to demand a trial. Had the witness been available, appellant insists, he would have testified that despite their frequent association at the racetrack he had never seen appellant deal with any of the alleged cashers. Even accepting appellant's prediction as wholly accurate, the lost purely negative testimony would clearly not have exonerated him. At best what the witness had failed to see, claimed to be inconsistent with the testimony of five government witnesses, might have affected their credibility. Such a minimal showing of possible preju-

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[5] Although appellant complains of a longer delay, the government announced in February, 1971 that it would be ready to proceed to trial any time after April 1st, subject to 20 days notice; the October trial date was fixed without objection by appellant.

dice will not suffice to overcome appellant's waiver of his right to a speedy trial.

The argument that because appellant was acquitted on the substantive count of the indictment, which had involved the preparation of a false Form 1099 on April 7, 1965, the government as a matter of law cannot have proved the commission of the only overt act put to the jury to support the conspiracy count, namely that appellant went to the raceway on the night of April 7, 1965, borders on the frivolous. The real objection seems to be to the alleged inconsistency of the verdict, but that is no ground for reversal. *United States* v. *Carbone,* 378 F.2d 420 (2d Cir.), *cert. denied,* 389 U.S. 914 (1967).

Lastly, while conceding that the government could properly bring out on direct examination of Elvin that he had been convicted of perjury, appellant contends that it was unfair to elicit the circumstances of the perjury, namely that he had lied to the grand jury about his relationship with appellant. Appellant, however, demonstrated on cross-examination that Elvin's perjury might well have been unrelated to appellant; moreover appellant clearly relied on the perjury conviction to discredit Elvin. In any case review is foreclosed by appellant's failure to make any proper objection below. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966).

The judgment is affirmed.

## APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and seventy-two.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
*Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that orders and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

## APPENDIX C

72-1146

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

DENIED

July 28, 1972

DENIED

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ J. JOSEPH SMITH
J. Joseph Smith

/s/ PAUL R. HAYS
Paul R. Hays

72-1146

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
*Acting Chief Judge*

July 28, 1972

## APPENDIX D

### Title 18, United States Code

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

### Title 26, United States Code

§ 7206. Fraud and False Statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or

falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

**Federal Rules of Criminal Procedure**

Rule 52.
HARMLESS ERROR AND PLAIN ERROR

* * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

**Rules of the U. S. Courts**

**Second Circuit Rules Regarding Prompt Disposition of Criminal Cases**

(promulgated January 5, 1971 as amended May 24, 1971)

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The Circuit Council of the Second Circuit in the exercise of its supervisory power over the administration of justice in the federal courts of the circuit, and pursuant to its powers under 28 U.S. Code § 332, hereby promulgates the following rules for observance in the district courts of the circuit, commencing six months from the date of this announcement:

* * *

4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the gov-

ernment is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

• • •

8. A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-342

DAVID HANDEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-5a) is not yet officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 13, 1972 (Pet. App. 6a). A petition for rehearing or rehearing *en banc* was denied on July 28, 1972 (Pet. App. 7a-8a). The petition for certiorari

was filed on August 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether on the facts of this case petitioner was denied his Sixth Amendment right to a speedy trial.

2. Whether testimony given by a co-conspirator concerning a prior perjury conviction relating to the events involved in this case constituted reversible error even in the absence of a proper objection during the trial.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to defraud the United States in the ascertainment and collection of revenue information necessary to determine petitioner's tax liability, in violation of 18 U.S.C. 371. Petitioner was acquitted of a substantive charge of causing the preparation and filing of a false information tax return in violation of Section 7206(2) of the Internal Revenue Code of 1954.

Petitioner was charged with participating in a scheme whereby his winnings from pari-mutuel "twin double" betting were reported in the names of various stand-ins who cashed winning tickets for him and completed the required information returns. To win the twin double it was necessary first to pick the winners in the sixth and seventh races. These tickets could then be exchanged for a new ticket containing

the bettor's choices for the eighth and ninth races. The evidence showed that petitioner purchased potentially winning tickets after the first two races had been run, and that, working through a middleman (often one Robert Elvin), petitioner had his winning tickets cashed by one of several individuals. When the winnings on a ticket exceeded $600, the race track was required to fill out an information tax return. In this manner, the winnings were reported in the name of the cashers and not in petitioner's name.

Robert Elvin, a co-defendant, pleaded guilty to the conspiracy count and testified for the government concerning petitioner's part in the scheme. Four of the seven cashers named in the conspiracy count also testified for the government, and each named petitioner as the bettor for whom the tickets were cashed (two received the tickets from Elvin).

The facts relevant to the speedy trial issue are these. The conspiracy alleged related to events that took place in 1964 and 1965. Petitioner was first questioned in 1965, and was initially arrested on a complaint on May 23, 1966. The complaint was formally dismissed on July 17, 1966, pending presentation of the case to a grand jury, when petitioner claimed it was causing him severe economic hardship. The indictment was returned on December 5, 1968. On June 2, 1969, petitioner moved for a bill of particulars to be furnished not later than 30 days prior to trial. On February 7, 1971, the government announced it would be ready for trial on April 1, 1971, subject to 20 days notice. On March 10, 1971, the

trial was set for October 4, 1971. On September 21, 1971, petitioner moved to dismiss the indictment, claiming denial of his right to a speedy trial.

The court of appeals affirmed the conviction, holding that petitioner was not deprived of his right to a speedy trial, that he was not prejudiced by the testimony of Elvin concerning his own perjury conviction, and that there was ample proof to support the jury's verdict. Only the first two holdings are in issue here.

## ARGUMENT

1. Relying on *Barker* v. *Wingo*, No. 71-5255, June 22, 1972, petitioner contends (Pet. 6-12) that he was denied the right to a speedy trial. This claim was examined and rejected by the court of appeals, on the basis of a balancing process very similar to that set out in *Barker*, decided shortly after the court of appeals released its opinion.[1] Any difference between *Barker* and the decision below is one of phraseology, rather than substance. Indeed, rehearing and rehearing *en banc* were denied after this Court's decision in *Barker*. In *Barker* this Court emphasized that courts must "approach speedy-trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determin-

[1] *United States* v. *Marion*, 404 U.S. 307, and the Second Circuit rule as expressed in *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936, appear to be the primary basis of the lower court's decision. *Mancusi* was cited with approval in *Barker* (slip op. 10-11, n. 23).

ing whether a particular defendant has been deprived of his right" (slip op. 16). Further review of the application of these factors to the facts of this case is not warranted.

Petitioner's primary contention is that substantial prejudice resulted from the death of a witness during the period of post-indictment delay. Petitioner claims this witness could have contradicted the testimony of five government witnesses, by testifying that he had not observed petitioner in their company at the race track. It is quite apparent, however, as expressed by the court of appeals (Pet. App. 4a), that at most only negative testimony was lost. The witness could not have exonerated petitioner and could only have testified to what he did not see. This would not have overcome the positive testimony of five government witnesses that they acted for petitioner in cashing his winning tickets.

The other factors listed in *Barker* also show that there was no Sixth Amendment violation. The length of the delay, as traced above, was not unreasonable. Although petitioner speaks of a five and a half year delay, the dismissal of the original complaint for petitioner's benefit warrants disregard of the post-arrest, pre-indictment interval, as the court below held. The subsequent period of about two years prior to announcement of readiness cannot be said to be unreasonable in preparing a conspiracy case for trial in a busy district.

Finally, throughout this period, the only act by the petitioner was the filing of a motion for a bill of

particulars to be furnished not later than 30 days prior to the trial. Not until a few weeks before the trial date, which had been scheduled months in advance and well after the government announced it was ready for trial, did petitioner assert that his speedy-trial right had been denied. Up to this point, petitioner had expressed no interest at all in bringing this matter to a head in a trial. While silence is not to be viewed as a waiver, this Court emphasized in *Barker*, that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial" (slip op. 18).

2. Petitioner's claim (Pet. 13-18) that he was denied a fair trial because of the introduction of testimony concerning the perjury conviction of a government witness is also without merit. Robert Elvin (the witness) had pleaded guilty to Count One of this same indictment charging petitioner with conspiracy, and Elvin was also found guilty by a jury of giving perjured testimony before the grand jury. These facts were brought out by the government on direct examination to prevent petitioner from arguing that the government was trying to withhold this information. The witness was then allowed to testify concerning the exact nature of the perjury. Had petitioner decided it would be best to prevent the jury from hearing such testimony at all, it could have been excluded on his proper request.[2]

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[2] "There may be circumstances where, *on proper request of the defense*, the trial judge should limit, or even bar such testimony, or allow it only under cautionary instructions be-

Having failed to make a proper objection to the introduction of the testimony,[3] petitioner now argues that this testimony was so prejudicial as to deny him a fair trial. Since petitioner vigorously pursued the question of the witness's perjury conviction on cross-examination in an effort to impeach him, it is obvious the government could have proved the nature of the conviction on redirect. Permitting the testimony concerning the nature of the perjury conviction to be mentioned on direct examination was at most harmless error. Lack of prejudice is also shown by the fact that there was testimony from four other witnesses who placed petitioner in the middle of the conspiracy.

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cause the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background." (Emphasis added.) *United States* v. *Freeman*, 302 F. 2d 347, 350 (C.A. 2).

[3] The petitioner objected on the basis of the best evidence rule when the witness was asked what the conviction was about. There was no objection to the witness's testimony that he had a conviction. See *United States* v. *Indiviglio*, 352 F. 2d 276 (C.A. 2), certiorari denied, 383 U.S. 907.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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OCTOBER 1972.

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